No. 84-351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ATASCADERO STATE HOSPITAL,

AND

CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
Petitioners,

v.

DOUGLAS JAMES SCANLON,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Did Congress abrogate the Eleventh Amendment immunity of the states by creating, pursuant to its Article I, Section 8 and Fourteenth Amendment powers, a federally enforceable cause of action against the states under Sections 504 and 505 of the Rehabilitation Act of 1973?

2. Under federal and California law did California, a recipient of federal financial assistance, waive its Eleventh Amendment immunity and consent to be sued when it engaged in an act of discrimination clearly prohibited by Section 504, and when Sections 504 and 505 create a federally enforceable private right of action?

3. Should *Hans* v. *Louisiana*, 134 U.S. 1 (1890), be overruled insofar as it limits federal court jurisdiction over federal question actions?

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1964 U.S. Code Cong. & Admin. News at 2469-2470, 2512-2513 9

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Oversight Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies under the Rehabilitation Act of 1973, before the Senate Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 94th Cong., 2d. Sess. (1976) 21, 23

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Borchand, *Government Liability in Tort*, 34 Yale L. J. 1 (1924) 34

Burgdorf and Burgdorf, *A History of Unequal Treatment: the Qualifications of Handicapped Persons as a Suspect Class Under the Equal Protection Clause*, 15 Santa Clara Lawyer 855 (1975) 14

Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 Am. U.L. Rev. 31 (1977) 14

Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Col. L. Rev. 1890 (1983) 34, 38, 44

Jaffee, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963) . 34

Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 Ga. L. Rev. 207 (1968) 34, 44

Note, *Torts: Sovereign Immunity: Scope of Doctrine Severely Limited in California* 49 Calif. L. Rev 400 (1961) 29

Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Col. L. Rev. 1413 (1976) 42, 44

Orth, *The Intrepreation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, U.Ill. L.F. 423 (1983) 46

Wegner, *The Antidiscrimination Model Reconsidered: Insuring Equal Opportunity without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 Corn. L. Rev. 401 (1984) 16

D. Treatises

Blackstone, W., *Commentaries on the Laws of England*, I, Elliot, J., Ed., *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, v. 2 & 3 (1866) 34

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Ford, P., *Pamphlets on the Constitution of the United States*, (1888) 35

Friedman, L. & F. Israel, Eds., *The Justices of the United States Supreme Court 1789-1969*, v. 1 (1969) 41, 45

Jacobs, C., *The Eleventh Amendment and Sovereign Immunity*, (1972) 34, 44

Larson, *Federal Court Awards of Attorney's Fees*, (1981) 26

Office of the Assistant Secretary for Management and Budget, U.S. Dept. of Health and Human Services, "Financial Assistance by Geographia Area, Fiscal Year 1983, Region IX," DHHS Publications No. (65) 83-12. 2

The Complete Anti-Federalist, (H. Stoering Ed. 1981) 37

The Debates in the Several State Conventions of the Adoption of the Federal Constitution (J. Elliot, Ed. 1866) 36, 38, 40,

The Federalist Papers, (Mentor Ed., 1962) 39

U.S. Dept. of State, *Documentary History of the Constitution*, v. ii (1984) 41, 43

Warren, C., *The Supreme Court in United States History*, (1922) 43

ADDITIONAL CONSTITUTIONAL PROVISIONS

Included as Appendix A are the following provisions of the United States Constitution: (1) the Spending Clause—Article I, Section 8, Clause 1; (2) Article III, Section 2; (3) the Supremacy Clause—Article VI, Clause 2; (4) Sections 1 and 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

Respondent Douglas James Scanlon adopts the statement of the case set forth in the Ninth Circuit opinion reported at 735 F.2d 359, and adopts his Statement of the Case at pp. 2-4 in Respondent's Brief in Opposition to the Petition for Writ of Certiorari. To those statements he adds the following:

First, although petitioners (California) now dispute that Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, was enacted pursuant to Section 5 of the Fourteenth Amendment, Pet. Br. at 67-71, below they conceded that Section 504 was enacted pursuant to Congress' power under Section 5 of the Fourteenth Amendment:

> "The federal Rehabilitation Act of 1973 and the civil rights legislation to which it is coat-tailed were enacted pursuant to the *Fourteenth Amendment*, not the Commerce Clause, or the War Powers Clause, or the like." (C.R. 12-3).[1] (Emphasis in original.)

Second, although the United States Department of Health, Education, and Welfare (HEW)—predecessor to the United States Department Health and Human Services (HHS)—found California to be in violation of Section 504 in May, 1979, to date no enforcement action has been taken by either HEW or HHS.

Third, the job from which respondent was excluded was a part-time, 9-month student internship position. J.A. at 9, ¶ 8.

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[1] Citation is to designated certified record in Court of Appeal, by docket control number and page. Thus C.R. 12-3 represents docket control number 12 at page 3. Citations to Joint Appendix will appear as "J.A. at ____."

Fourth, respondent is a citizen and resident of the State of California. J.A. at 5.

Fifth, while the record does not indicate the amount of federal financial assistant going to California, public records indicate that for fiscal year 1983, California received a total of $28,684,822,392 in federal assistance from HHS alone.[2]

Sixth, the amicus brief of the Solicitor General in support of California constitutes a dramatic reversal of the Department of Justice's position on whether suits can be brought against the state under Section 504. The Department of Justice filed a brief *amicus curiae* in the Ninth Circuit of Appeals in support of respondent Scanlon.[3]

SUMMARY OF ARGUMENT

In enacting and amending Section 504 Congress has abrogated any Eleventh Amendment immunity California may have. Section 504 is part of the "'civil rights enforcement scheme' that successive Congresses have created over the past 110 years." *Cf. Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n. 7 (1979). Section 504 was enacted pursuant to the Spending Clause and, as petitioners concede, the Fourteenth Amendment. The legislative history makes clear that states and local governmental entities were the primary targets in the enactment of Section 504.

Section 504 was considered and enacted in 1972 and 1973 against a backdrop of eight years of private and public enforcement of Titles VI and IX, whose language it tracks. (Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1671 *et seq.*) Section 504, like Title VI and Title IX, imposes nondiscrimina-

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[2] Office of the Assistant Secretary for Management and Budget, U.S. Dept. of Health and Human Services, "Financial Assistance by Georgraphic Area, Fiscal Year 1983, Region IX," DHHS Publications No, (65) 83-12.

[3] Citations to the Justice Department's brief in the Ninth Circuit will appear as "Ninth Circuit Br. of U.S. at ____." Citations to the Department's brief in this Court will appear as "Br. of U.S. at ____."

tion obligations on all recipients of federal financial assistance. A review of legislative history, regulations and litigation indicates that in enacting Section 504 Congress defined a class subject to suit which literally included states within the meaning of *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974).

Congress' intention to subject states to Section 504 obligations and to suit by private litigants in federal court was underscored by the 1978 amendments to Title V of the Rehabilitation Act, 29 U.S.C. §§ 791-794a.: the amendment extended Section 504's nondiscrimination obligations to the federal government itself and with the addition of Section 505, 29 U.S.C. § 794a, expressly extended Title VI remedies, procedures, and rights to Section 504 (§ 505(a)(2), 29 U.S.C. § 794a(a)(2)), and permitted an award of attorney's fees to a prevailing party. Certainly Congress did not waive federal immunity only to preserve the states' immunity. Ninth Circuit Br. of U.S. at 40.

Section 504 by imposing substantive requirements on states is thus distinguishable from acts which merely declare policy, *Pennhurst State School* v. *Halderman (Pennhurst I)*, 451 U.S. 1, 19 (1981), or are merely cooperative state-federal programs. *Edelman* v. *Jordan, supra; Florida Dept. of Health* v. *Florida Nursing Home Ass'n.*, 450 U.S. 147 (1981). The Eleventh Amendment is no bar particularly where Congress has acted pursuant to its powers under the Fourteenth Amendment and deliberately has included the states within the class of defendants subject to federal court suit. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976); *Hutto* v. *Finney*, 437 U.S. 678, 693-698 (1978).

California by Article 3, § 5 of its Constitution has waived any immunity except as affirmatively imposed by its legislature. The legislature has imposed no immunity to federal suit. Additionally, under federal and California law California has consented to suit.

Finally, as it discussed fully in Section II, *infra*, the legislative history of Article III and the Eleventh Amendment demonstrates no intent to immunize the states from suits com-

menced in federal court by their own citizens so as to override the actual language of the Amendment itself.[4] Accordingly, *Hans* v. *Louisiana*, 134 U.S. 1 (1980) and *Edelman* v. *Jordan*, *supra*, to the extent it relies on *Hans*, should be overruled. The rules they create are unsound in principle and unworkable in practice. *Cf. Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (February 19, 1985).

ARGUMENT

I. IN ENACTING SECTION 504 CONGRESS HAS ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES. SECTION 504 IS A BROADLY REMEDIAL STATUTE THAT WAS ENACTED TO HALT HANDICAP DISCRIMINATION. CONGRESS EXPRESSLY INTENDED TO LIMIT THE DISCRIMINATORY ACTIONS OF THE STATES AND TO HOLD THE STATES ACCOUNTABLE IN FEDERAL COURT FOR ACTS OF DISCRIMINATION. MOREOVER, EVEN IN THE ABSENCE OF ABROGATION CALIFORNIA HAS WAIVED ITS IMMUNITY AND HAS CONSENTED TO SUIT.

All parties and amici agree that under current case law the Eleventh Amendment immunity of the state is not absolute. Congress can abrogate the immunity. *Fitzpatrick* v. *Bitzer*, *supra; Hutto* v. *Finney*, *supra*. The state can waive the immunity and consent to suit. *Parden* v. *Terminal Railway Co.*, 377 U.S. 184 (1964); *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). Abrogation, waiver and consent are all present in this litigation.

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[4] For instance, the Madison-Marshall-Hamilton statements relied upon in *Hans* were not made until *after* nine states had ratified the constitution thereby putting the constitution into effect under Article VII. The opponents and proponents of ratification prior to that time agreed that states were amenable to suit in federal court by citizens of their own state and other states. In addition, two proposed versions of the Eleventh Amendment were introduced in the House of Representatives. The version rejected was the version which by its terms would have barred suit against a state by its own citizens.

With the passage of Section 504 of the Rehabilitation Act of 1973, this country turned a new corner in its history. As with the Fourteenth Amendment and the Civil Rights Acts of the Reconstruction Era, with Section 504 a "new structure of law" emerged. *Cf.*, *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972). Section 504 was aimed at "improving the lot of the handicapped," *Consolidated Rail Corp.* v. *Darrone*, 104 S.Ct. 1248, 1250 (1984)*(Darrone)*, through the eradication of government sponsored or condoned discrimination.

> "Section 504 was enacted to prevent discrimination against all handicapped individuals . . . in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs."

S. Rep. No. 93-1297 at 38. (1974).

> "Simply stated, the goal of this new law is to help handicapped individuals to achieve their full potential of participation within our society."

118 Cong.Rec. 35, 841 (1972) (remarks of Senator Stafford).[5]

Section 504 creates personal rights which Congress intends to be privately enforced. *Cf.*, *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 419-20 nn. 26-28 (1978) (Stevens, J.) *(Bakke)* (interpreting Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*); *Cannon* v. *University of Chicago*, 441 U.S. 677, 689-709 (1979) *(Cannon)* (interpreting Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1671 et seq.). The language of Section 504, like that of Title VI whose words Section 504 tracks, "is majestic in its sweep," *Bakke*, *supra*, 438 U.S. at 284 (Powell, J.), and must be accorded "a sweep as broad as its language." *Cf.*, *North Haven Bd. of Education* v. *Bell*, 456 U.S. 512, 521 (1982), *quoting*

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[5] *See also*, 119 Cong.Rec. 24, 589-24, 590 (1973). (Remarks of Sen. Dole); 119 Cong. Rec. 24, 587 (1973) (remarks of Sen. Taft); 118 Cong. Rec. 8975 (1972) (remarks of Rep. Brademas); 118 Cong. Rec. 8976 (1972) (remarks of Rep. Perkins); (Section 504 was intended to be "a bill of rights for the handicapped.") 119 Cong. Rec. 7105 (1973) (remarks of Rep. Peyser).

United States v. *Price*, 383 U.S. 787, 801 (1966); *see also*, *S-1* v. *Turlington*, 635 F.2d 342, 347 (5th Cir.), *cert. denied*, 454 U.S. 838 (1981).

Contrary to the new position of the United States, Br. of U.S. at 23, "language as broad as that of § 504 cannot be read in isolation from its history and purposes." *Darrone*, *supra*, 104 S.Ct. at 1254 n. 13. This history and purpose confirm that the Eleventh Amendment has no application to Section 504.[6]

A. With Section 504 Congress enacted legislation against a class that literally included the states.

1. Pre-enactment history.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, provides, in relevant part:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . ."

As is plain, the statute applies to *any* recipient of federal financial assistance. However, in considering Section 504 and its predecessors, Congress paid particular attention to discriminatory action by the states and other units of government.

The origins of Section 504 lay in proposals to amend Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.[7] *Alexander* v. *Choate*, 105 S.Ct. 712, 718 n. 13 (1985). These early proposals are the "primary sign post[s], on the road toward interpreting

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[6] *Accord*, "the Congressional intent to make states amenable to suit under Section 504 can be gleaned from the framework of the statute, its legislative history and statutory purpose." Ninth Circuit Br. of U.S. at 32.

[7] Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

the legislative history of § 504" *Id.* In introducing the Title VI predecessor to Section 504, Rep. Vanik stated:

> "Our Governments tax [handicapped] people, their parents and relatives, but fail to provide services for them. . . . The opportunities provided by the Government almost always exclude the handicapped."

117 Cong. Rec. 45,974 (1971). Rep. Vanik saw in emerging court decisions the need for this measure. Rep. Vanik focused on *Penn. Assoc. for Retarded Children (PARC)* v. *Commonwealth of Penn.*, 343 F.Supp. 279 (E.D.Pa. 1972),[8] which he described as a "suit against the State," 117 Cong. Rec. 45,974-45,975 (1971), to highlight the inadequacies of State programs for handicapped persons. *See also*, 118 Cong.Rec. 1595 (1972), where Rep. Vanik again referring to the *PARC* v. *Pennsylvania* decision stated, "In most States, many mentally retarded children have also been denied their rights to an eduction. . . . As long as this horrible exclusion exists in most of the states in our land, you can exclude any children you desire."

Barely two months after introducing his bill, Rep. Vanik again noted:

> "While parents seek medical care for their children, *State* and local governments lack funds and facilities. Handicapped children of low-income families seek tuition funding, but *State* and local governments favor the higher income families. . . .
>
> The handicapped child is excluded from schools because the *States* are either unable to define and deal with his illness, or care is so shoddy that the problems are multiplied. . . .
>
> Exclusion of handicapped children is illegal in some *States*, but the *States* plead lack of funds. . . . Statistics

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[8] This Court has recognized the importance of the *PARC* decision as a key impetus to Congressional protection of handicapped rights. *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176, 192-196 (1982). *See also*, *Mills* v. *Bd. of Education*, 348 F.Supp. 866 (D.D.C. 1972), for another court decision that greatly affected the congressional debate on the rights of handicapped persons.

> concerning *State* care of the handicapped child are shocking. They range from the *California* rate of providing service for 54 percent of the handicapped children in the State, to *Vermont's* rate of approximately 22 percent. . . .

118 Cong. Rec. 4341 (1972) (emphasis added). *See also*, 118 Cong. Rec. 2999 (1972) (remarks of Rep. Vanik) ("the average American discriminates by his attitude against the disabled veteran. The *State* governments discriminate by their apathy. . . .") (emphasis added).

Senator Humphrey, Rep. Vanik's Senate counterpart, likewise focused almost exclusively on the failures of government at all levels "to insure equal opportunities" when he introduced the bill in the Senate. 118 Cong. Rec. 525 (1972). Senator Humphrey paid particular attention to a suit against a state operated institution for mentally retarded persons[9] as demonstrating the need for the bill. 118 Cong. Rec. 9495, 9501 (1972).

By the time the Humphrey-Vanik bill joined the Rehabilitation Act and became Section 504, *see*, *Alexander* v. *Choate*, *supra*, 105 U.S. at 718 nn.13-14, not only had the principal authors publicly focused on the discrimination faced by handicapped persons in state-operated programs and activities, but a substantial history had developed around the use of the term "receiving federal financial assistance" as currently used in the section. The history of the phrase "receiving federal financial assistance" in Titles VI and IX[10] confirms that Section 504 was expressly intended to reach the activities of the states.

Soon after Title VI was enacted seven agencies, assisted by the Justice Department, prepared regulations to implement the act. *Guardian Ass'n.* v. *Civil Service Comm.*, 103 S.Ct. 3221, 3227 n.13 (White, J.) (1983). Uniformly these regulations

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[9] While Senator Humphrey did not indicate the name of the case he was referring to, from the context it appears to have been *Wyatt* v. *Stickney*, 344 F.Supp. 373, 344 F.Supp. 387 (M.D. Ala 1972), *aff'd sub nom Wyatt* v. *Aderholt*, 403 F.2d 1305 (5th Cir. 1974), a suit against Alabama's Partlow State Hospital.

[10] The operative language of Title IX clearly resembles that used in Section 504 and in Title VI. *See*, 20 U.S.C. § 1681(a).

defined a recipient of federal financial assistance as including states and state agencies. See 29 Fed. Reg. 16274-16305 (1964).[11]

Obviously by attempting to include within Title VI a ban on handicap discrimination eight years after these regulations were issued, Senator Humphrey and Rep. Vanik and the rest of Congress knew that the ban applied to states and state agencies.[12] Congress is presumed to know the law particularly in an area in which it has reviewed closely. *Bob Jones Universi-*

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[11] In these regulations a recipient was defined as:

> "any State, political subdivision of any State or instrumentality of any State or political subdivision, . . ."

See e.g., 29 Fed. Reg. 16274, § 15.2(e) (Dept. of Agriculture).

In short order these seven agencies were joined by every Cabinet department and about 40 federal agencies all of whom defined a recipient of federal financial assistance as including a state or state agency. *Guardians Association, supra,* 103 S.Ct. at 3227 n.13 (White, J.).

See e.g., Dept. of Justice, 28 C.F.R. § 42.102(f) (1984); *See also*, 29 Fed.Reg. 16274-16305 (1964).

[12] As passed by Congress Title VI did not define "recipient of federal financial assistance." Consequently, it was left to administrative regulations to define this term. As the United States noted in the court below, Ninth Circuit Br. of U.S. at 34 n.32, Title VI was principally geared to affect the states and other units of government.

In discussing the proposed judicial review mechanism in Title VI, Senator Javits stated that "[w]e are primarily trying to reach units of government, not individuals. In the majority of cases, they will be the defendants under Title VI." 110 Cong. Rec. 13700 (1964); *see also, id* at 1542 (1964) (remarks of Rep. Lindsay); *Id* at 10075-10076 (1964). The General Statement of Purpose is that the Civil Rights Act of 1964 will "open additional avenues to deal with redress of denials of equal protection of the laws on account of race, color, religion, or national origin by State or local authorities." 1964 U.S. Code Cong. & Admin. News at 2394. *See also* 1964 U.S. Code Cong. & Admin. News at 2469-2470, 2512-2513.

ty v. *IRS*, 461 U.S. 574, 600-01 (1983); *Cannon*, *supra*, 441 U.S. at 696-700.

As in Title VI, when Title IX was enacted in 1972 Congress did not define the term "recipient." However, this time Congress was not writing on a blank slate. *Cannon*, *supra*, 441 U.S. at 694-95. Indeed the regulations that govern Title IX define recipient under Title IX in the same words as do the regulations of Title VI.[13]

Clearly by the time that Section 504 was drafted Congress knew the meaning of "recipient of federal financial assistance" as used in federal civil rights laws.[14] In this regard, given the clear Title VI and IX foundation of Section 504, the definition of recipient in Title VI regulations as including a state, and the repeated references by the sponsors of Section 504 to the discriminatory actions of states, it is not surprising that no member of Congress questioned whether Section 504 applied to the states.

If Congress had wanted to limit the applicability of Section 504 it had ample opportunity to do so. Before Section 504 was enacted into law in 1973, the Rehabilitation Act of which it was part was twice vetoed by President Nixon. *See* 118 Cong. Rec. 37203-37204 (1972); 119 Cong. Rec. 9597 (1973). Consequently, Congress had three occasions to consider Section 504 in the span of less than 2 years. In none of these debates did anyone

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[13] Under Title IX "recipient"

> "means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, . . ."

34 C.F.R. § 106.2(h). Compare note 11, *supra*. *See also* 37 Fed. Reg. 20,122 (1972).

[14] Legislation should be viewed in the context of its "cultural milieu." *Katzenbach* v. *Morgan*, 384 U.S. 641, 654, and n.14 (1966); *accord Cannon*, *supra*, 441 U.S. at 698-699 ("evaluation of congressional action . . . must take into account its contemporary legal context.")

seek to limit the reach of Section 504. To the contrary, the section was lauded for its scope. Congress was told that Section 504 would "prohibit[] *any kind* of discrimination against handicapped individuals with respect to *any* program receiving Federal financial assistance." 118 Cong. Rec. 30681 (1972) (remarks of Senator Randolph) (emphasis added).[15]

2. Post enactment history.

The Rehabilitation Act was amended in 1974 by the same Congress that had enacted it a year earlier.[16] The Court has recognized the importance of these amendments to the understanding of Section 504. *Darrone*, *supra*, 104 S.Ct. at 1254 n.13; *Alexander* v. *Choate*, *supra*, 105 S.Ct. at 718-720 & n.7 and 13. The Senate Report that accompanied the amendment stated:

> Section 504 was patterned after, and is almost identical to, the andidiscrimination language of section 601 of the Civil Rights Act of 1964, . . . and section 901 of the Education Amendments of 1974 [sic] . . . The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. . . .
>
> The language of section 504, in following the above cited Acts, further envisions the . . . promulgation of regulations. . . .

S. Rep. No. 93-1297, *supra*, at 39-40. If there had been any doubt in 1973 about the link betweeen Section 504 and Titles VI and IX, by 1974 these had been resolved.

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[15] *See also*, 119 Cong. Rec. 18137 (1973) (remarks of Rep. Vanik); 118 Cong. Rec. 32310 (1972) (remarks of Senator Humphrey); 119 Cong. Rec. 24,586-24,587 (1973) (remarks of Senator Randolph, ". . . the antidiscrimination . . . provisions are preserved. These will help expand the vistas of opportunity for handicapped individuals across our land.").

[16] Pub. L. No. 93-516, 88 Stat. 1617. See *Darrone*, *supra*, 104 S.Ct. at 1253-1254.

In 1977 Congress held hearings on the implementation of Section 504.[17] In the years between 1974 and 1977 Section 504 regulations had been proposed and promulgated by HEW.[18] These regulations defined recipient of federal financial assistance as including the States in the same terms as used in the Titles VI and IX regulations:

> 45 C.F.R. § 84.3(f).
>
> 'Recipient' means any state or its political subdivision, any instrumentality of a state or its political subdivision. . . .[19]

These regulations were warmly received by Congress, *see, e.g., 1977 Section 504 Implementation Hearings, supra*, at 1 (remarks of Rep. Brademas), and were codified into Section 504 when the Rehabilitation Act was amended in 1978. *Darrone, supra*, 104 S.Ct. at 1255 n.15. *See also, S. Rep.* 95-890, 95th Cong., 2d Sess. at 19 (1978). Again, no member of Congress questioned the reach of Section 504 as encompassing the states.

During the *1977 Section 504 Implementation Hearings*, the House received considerable evidence from the states about

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[17] *Implementation of Section 504, Rehabilitation Act of 1973. Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. (1977) (hereinafter *1977 Section 504 Implementation Hearings*).

[18] In 1976, the President directed the Secretary of HEW to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of Section 504." Exec. Order No., 11914, 41 Fed.Reg. 17871 (1976). The Secretary promulgated regulations in 1977 to govern its own recipients of federal financial assistance. 42 Fed.Reg. 22676 (1977). One year later it promulgated its coordinating regulations. 43 Fed.Reg. 2132 (1978).

[19] See notes 11 and 13, *supra*, for definitions under Titles VI and IX. All executive departments and agencies that have issued Section 504 regulation have defined recipient to include states. *See, e.g.*, Dept. of Justice, 28 C.F.R. § 41.3(d).

the cost of implementing Section 504. *See, e.g., 1977 Section 504 Implementation Hearings, supra,* at 2, 5-6, 13, 37, 43-44, 78-131. While some members of the House were sympathetic to the impact of the costs imposed upon the states by Section 504, *id.* at 78-79 (remarks of Rep. Jeffords),[20] even these members did not believe that implementation of Section 504 should be delayed because it cost state money to meet the section's requirements. 124 Cong. Rec, 38,551 (1978) (Rep. Jeffords). Again this is strong recognition that Congress all along fully intended Section 504 to reach the states. Obviously, too, it is strong indication that the states also realized that they were the intended targets of Section 504 from the start and that expenditure of their own funds woud be no bar to Section 504 rights. *See* Section C *infra.*

Finally, Congress amended Section 504 in 1978 to bring within its terms the federal government.[21] In describing this amendment Rep. Jeffords linked inclusion of the federal government to prior inclusion of the states:

> This amendment removes that exemption [of the federal government] and applies 504 to the Federal Government *as well as State* and local recipients of Federal dollars.

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[20] *See also,* 123 Cong. Rec. 17,546-17,547 (1977) (Rep. Jeffords); 120 Cong. Rec. 15743-15744 (1974) (remarks of Rep. Biaggi); Note: *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act,* 55 N.Y.U. L. Rev. 881, 888-893 (1980).

[21] In 1977 the Justice Department Office of Legal Counsel issued an opinion that the Section did not apply to programs conducted by the federal government. In 1978 Section 504 was amended to bring the federal government expressly within the section's reach. As a result section 504 now states that it applies to "any program or activity conducted by an Executive agency or by the United States Postal Service" in addition to "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794.

124 Cong. Rec. 13,901 (1978) (emphasis added).[22]

B. Utilizing Its Fourteenth Amendment Powers Congress Enacted Section 504 And Directed That Section 504 Be Enforced By Private Parties Against All Recipients Of Federal Financial Assistance Including The States.

1. Congress utilized its plenary power under the Fourteenth Amendment when it enacted Section 504.

Just as earlier Civil Rights statutes sought to erase discrimination against women and minorities, Section 504 was enacted to halt a long history of discrimination against disbled persons. *Alexander* v. *Choate*, *supra*, 105 S.Ct. at 718 n.12, and authorities cited therein.[23] Congress has long been aware of the discrimination faced by disabled persons.[24] Throughout

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[22] *See also*, 124 Cong. Rec. 38551 (1978) (remarks of Rep. Jeffords, "Somehow it did not seem right to me that the Federal Government *should require States and localities to eliminate discrimination wherever it exists* and remain exempt themselves.") (emphasis added); *Id.* at 38552 (remarks of Rep. Sarasin, "No one should discriminate against an individual because he or she suffers from a handicap—not private employers, *not State and local governments*, and most certainly, not the Federal Government.") (emphasis added).

[23] *See also*, Burgdorf & Burgdorf, *A History of Unequal Treatment: the Qualifications of Handicapped Persons as a Suspect Class Under the Equal Protection Clause*, 15 Santa Clara Lawyer 855 (1975); Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 Am. U. L. Rev. 31 (1977); *cf*, *Cannon*, *supra*, 441 U.S. at 677-678 n.7.

[24] 118 Cong. Rec. 3320-3322 (1972) (remarks of Senator Williams); S. Rep. No. 93-319, 93rd Cong. 1st Sess. at 2-3; S. Rept. No. 93-1297, *supra*, at 50; 117 Cong. Rec. 42293-42294 (1971); (remarks of Senator Cook regarding Senate Concurrent Res. No. 52); 118 Cong. Rec. 1368 (1972) (remarks of Senator Percy); White House Conference on Handicapped Individuals, Title III of Pub. L. 93-516, 88 Stat. 1631-1634, 29 U.S.C. § 701, note ("The Congress finds that . . . (2) the benefits and fundamental rights of this society are often denied those individuals with mental and physical handicaps.").

its history Section 504 was called alternately a "milestone," 118 Cong. Rec. 30681 (1972) (remarks of Sen. Cranston) and the "baseline civil rights provision for handicapped Americans." 124 Cong. Rec. 30328 (1978) (remarks of Senator Stafford). The section's purpose was to end discrimination in all of its forms. 119 Cong. Rec. 24587 (1973) (remarks of Senator Taft); *see also*, S. Rep. No. 93-1297, *supra* at 38. It "guarantees the civil rights of the handicapped." 122 Cong. Rec. 3257 (1976) (remarks of Rep. Dodd); 124 Cong. Rec. 30346 (1978) (remarks of Senator Cranston); *id* at 30326 (remarks of Senator Dole).

This purpose had been clear from the beginning. In introducing the Title VI predecessor to Section 504 Rep. Vanik stated that the measure "provide[s] equal treatment of the handicapped . . ." and "will insure equal education and employment opportunities." 117 Cong. Rec. 45974 (1971). Barely one month later Rep. Vanik stated that his proposal was an "endeavor to insure the protection of the legal and constitutional rights of our . . . citizens." 118 Cong. Rec. 1595 (1972); *accord* 118 Cong. Rec. 2999 (1972); *id* at 4342; 119 Cong. Rec. 18137 (1973).

Senator Humphrey's remarks echoed Rep. Vanik's.

> "I introduce . . . a bill to insure equal opportunities for the handicapped . . .
>
> "I am insisting that the civil rights of 40 million Americans now be affirmed and effectively guaranteed by Congress. . . ."

118 Cong. Rec. 525 (1972). Less than 2 months later Senator Humphrey stated:

> "This bill responded to an awakening public interest in millions of handicapped children, youth and adults. . . . It is essential that the right of these forgotten Americans to equal protection under laws be effectively enforced. . . .

118 Cong. Rec. 9495; *accord*, *id* at 11789-11790, *id.* at 32310. Senator Humphrey's co-sponor, Senator Percy, was equally emphatic:

> "The amendment we are introducing today would realize this commitment [ending discrimination], [by] guarantee-

> ing the handicapped equal opportunity . . . [and] due process of law. . . ."

118 Cong. Rec. 526 (1972); *accord*, *id* at 11789.

In addition both Rep. Vanik and Senator Humphrey relied on federal court decisions against states that raised due process and equal protection challenges to the treatment of handicapped persons as strong evidence both of the necessity for the legislation and of the equal rights that this bill would secure for handicapped individuals. *See* 117 Cong. Rec. 45,974-45,975 (1971); 118 Cong. Rec. 1595 (1972); *id* at 9495, 9501; notes 8 and 9, *supra*, and accompanying text.[25]

Finally, in amending the law in 1978 and adding Section 505, both principal sponsors of the amendment noted that Congress had the power to enforce Section 504 "under among other things, section 5 of the 14th amendment." 124 Cong. Rec. 30347 (1978) (remarks of Senator Cranston); *id* at 37508 (remarks of Senator Stafford).

All of these remarks are the embodiment of a conscious Congressinal effort to extend the protections of the Fourteenth Amendment to handicapped persons. *Katzenback* v. *Morgan*, 384 U.S. 641-648, 650 (1966); *Fullilove* v. *Klutznick*, 448 U.S. 448, 476-480 (1980); *see also*, *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983); *see also*, Wegner, *The Antidiscrimination Model Reconsidered: Insuring Equal Opportunity without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 Corn. L. Rev. 401, 425-428 (1984).

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[25] *See also*, 118 Cong. Rec. 8975 (1972) (remarks of Rep. Brademas); *id* at 3322 (remarks of Senator Williams); *id* at 35840, 35841 (remarks of Senator Randolph); 119 Cong. Rec. 24589 (1973) (remarks of Senator Dole); *id* at 24587 (remarks of Senator Randolph); *id* at 24562 (remarks of Senator Stafford); 124 Cong. Rec. 13899 (1978) (remarks of Rep. Biaggi).

See also the preamable to HEW's regulation, 42 Fed. Reg. 22676 (1977).

This Court should reject California's attempt to ignore this history.[26] Significantly, this Court has already rejected that part of California's argument, Pet. Br. at 69-71, that the history and purpose of Title VI is completely transferable to Section 504. While the two laws are similar they are not identical. *Darrone*, *supra*, 105 S.Ct. at 716-720. Moreover, California's argument that Section 504 is exclusively a "spending clause" enactment, rests on the misrecognition of the history of Section 504. Section 504 springs from a separate history and purpose than the rest of the Rehabilitation Act of 1973. *See* Section IA *supra*. Section 504 was a conscious congressional effort to extend the protections of the constitution to a historically disrciminated against minority. *Cf.*, *Fullilove* v. *Klutznick*, 448 U.S. 448, 476-478 (1980); *EEOC* v. *Wyoming*, *supra*, 460 U.S. at 243, n.18; *see also*, notes 24-26, *supra*.[27]

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[26] For the first time on appeal California has argued that Section 504 was not enacted pursuant to Section 5 of the Fourteenth Amendment. Pet. Br. at 67-71. Before the District Court and the Court of Appeal California conceded that Section 504 was Fourteenth Amendment Section 5 legislation. *See* C.R. 12 at 3. Unlike the United States which at least has acknowledged and has attempted to explain its abrupt, and provocative, about face in this litigation, Br. of United States at 2-3, California has neither acknowledged its change in position nor has it explained the justification for it. It is well settled that this Court will not consider issues which were not raised below and this Court should not deviate from this principle now. *Adkickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Miree* v. *DeKalb County*, 433 U.S. 25, 33-34 (1977). The Court should assume, as California conceded and the United States has agreed, Br. of U.S. at 9, n.5, that Section 504 was enacted pursuant to Section 5 of the Fourteenth amendment, and that Congress using the Fourteenth Amendment's affirmative grant of power, which exists as an express limit on the states—*Fitzpatrick* v. *Bitzer*, 427 U.S. at 445, 456 (1976), *Ex parte Virginia*, 100 U.S. 339, 345 (1880)—created a private cause of action in federal court against the states.

[27] Section 504 also differs from Title VI in this regard. In the congressional debates concerning Title VI there was considerable question about whether the bill was necessary in light of Fourteenth Amendment case law. *See*, *e.g.*, 110 Cong. Rec. 1527 (1964) (memorandum of Rep. Cellar (1964); *id* at 6544 (remarks of Sen. Humphrey).

2. Congress intended that Section 504 be enforced by private parties against all recipients of federal financial assistance including the states.

In *Cannon*, this Court concluded that Congress in 1972 intended to create a cause of action under Title IX in part because Congress understood at that time that Title VI, upon which Title IX was based, created privately enforceable rights. 441 U.S. at 703. The same reasoning applies to Section 504 with even greater force.

Section 504 was enacted the year after Title IX and was based in part upon Titles VI and IX. *Alexander* v. *Choate*, *supra*, 105 S.Ct. at 719-721, and nn.7 and 13. Obviously if Congress knew in 1972 when enacting Title IX that Title VI could be privately enforced it retained this knowledge in 1973.[28] Indeed, although twice vetoed, the provision that ultimately became Section 504 was written initially in 1972, by the same Congress that enacted Title IX.

Cannon catalogues this Court's pre-1972 decisions which recognize implied rights of action under various federal statutes. 441 U.S. at 690 n.13. Consequently, in passing section 504 Congress had every reason to believe that implied rights of action under the section would be judicially recognized even against states. *Cannon*, *supra*, 441 U.S. at 718 (Rehnquist, J., concurring); *see, e.g.*, *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).[29] Even this Court's 1977 order in *Kruse* v.

Title VI was passed in part to make federal law comply to constitutional norms. *Id.* In enacting Section 504 there was no comparable congressional concern. Section 504 was enacted to extend the protections of the constitution to a previously discriminated against minority.

[28] *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 654 n.14; *Cannon*, *supra*, 441 U.S. at 698-699.

[29] The courts of appeals unanimously agree that Section 504 can be enforced through a private right of action. *Miener* v. *State of Missouri*, 673 F.2d 969, 973-975 (8th Cir. 1982); *Pushkin* v. *Regents of the University of Colorado*, 658 F.2d 1372, 1376-1380 (10th Cir. 1981); *Kling* v. *County of Los Angeles*, 633 F.2d 876, 878 (9th Cir.

Campbell, 431 F.Supp. 180 (E.D. Va. 1977), *vacated and remanded for consideration under Section 504*, 434 U.S. 808 (1977), a suit against Virginia officials, would seem to suggest that the Court condoned the private enforcement of Section 504. The *Kruse* order occurred only one year before Section 504 was again amended, this time to allow for the recovery of attorneys fees.

As with Title IX, a majority of this Court has also recognized a private right of action under Title VI. *Guardian's Ass'n.* v. *Civil Service Comm. of the City of New York*, *supra*. Without more, given the linkage between Section 504 and Titles VI and IX, this Court's *Cannon* and *Guardian's Association* decisions compel the conclusion that Congress intended Section 504 to confer a private right of action. However, in Section 504 there is considerably more evidence to demonstrate that in enacting and amending Section 504 and adding Section 505 Congress

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1980); *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds, sub nom Univesity of Texas* v. *Camenisch*, 451 U.S. 390 (1981); *N.A.A.C.P.* v. *Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1258 (3rd Cir. 1979); *Davis* v. *Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978), *rev'd on other grounds, sub nom Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979); *Lloyd* v. *Regional Transp. Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977).

The United States agrees that in enacting Section 504, Congress intended to create a private cause of action. *See*, Briefs of the United States as *Amicus Curiae* filed in this Court in *Southeastern Community College* v. *Davis*, *supra*; *Univesity of Texas* v. *Camenisch*, *supra*; *Consolidated Rail Corp.* v. *Darrone*, *supra*. California too is in strong agreement even where the defendant is a state instrumentality and is sued in federal court. *See* Brief of California as *Amicus Curiae*, *Southeastern Community College* v. *Davis*, *supra*. *Davis* and *Camenisch* both involved suits against state instrumentalities in federal court. In the Court of Appeal below, the United States argued strenuously that section 504 created a private right of action against the state in federal court. Ninth Circuit Br. of U.S. at 29-43.

intended to create a private right of action. The history of Sections 504 and 505, like that of Title IX,

> "[f]ar from evidencing any purpose to *deny* a private cause of action, . . . rather plainly indicates that Congress intended to create such a remedy."

Cannon, supra, 441 U.S. at 694. The Committee Report on the 1974 Amendments states that:

> "*This approach to implementation of section 504, . . . would permit a judicial remedy through a private action.*"

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 40 (1974) (emhasis added). This intent is confirmed by the addition of an attorney's fee provision to Title V of the Act in the 1978 Amendments, Section 505(b), 29 U.S.C. § 794(b). The legislative history underlying this attorneys' fee provision supports this reading. The Senate report on Section 505(b) states:

> "*The committee believes that the rights extended to handicapped individuals under title V, that is, . . . nondiscrimination under Federal grants—are, and will remain in need of constant vigilance by handicapped individuals to assure compliance*, and the *availability of attorney's fees should assist in vindicating private rights of action* in the case of section 502 and 503 cases, as well as those *arising under section* 501 and *504*."

S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978) (emphasis added); *see also, H.R. Rep. No. 95-1149*, 95th Cong., 2d Sess. 21 (1978). A similar attorney's fees provision in Title IX, construed by this Court in *Cannon*, led to the conclusion that

> "[t]he language of this provision explicitly presumes the availability of private suits to enforce [Title IX]. . . ."

441 U.S. at 699.

The Congressional debates on Section 505 state unequivocably that it was intended to apply to private plaintiffs. 124 Cong. Rec. 30346-30347 (1978) (remarks of Senator Cranston); 124 Cong. Rec. 37507-37508 (1978) (remarks of Senator Stafford). Moreover, Senate floor debate in 1978 on Section 505 reveals that Congess was keenly aware of judicial precedent on the private right of action issue. 124 Cong Rec.

30349 (1978) (remarks of Senator Bayh).[30] Several Courts of Appeals decisions found that a private right of action existed prior to the 1978 Amendments. *Lloyd* v. *Regional Transp. Authority*, 548 F.2d 1277, 1284-87 (7th Cir. 1977); *Kampmeir* v. *Nyquist, supra*, 553 F.2d 296, 299 (2d Cir. 1977) (a suit against, among others, a state); *Leary* v. *Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977); *Davis* v. *Southeastern Community College, supra*, 574 F.2d at 1159.

The seeds of Section 505 were fully sown in 1977. *See* H.R. 8862, 95th Cong., 1st Sess. (1977). In that year during the *1977 Section 504 Implementation Hearings, supra*, Congress was explicitly told of the need for an attorney's fees provision to enhance and strengthen private enforcement of Section 504. In no uncertain terms several witnesses stated that because of HEW administrative complaint processing delays, the need to encourage private enforcement was imperative. *See, 1977 Section 504 Implementation Hearings, supra*, 215, 234, 245, 257-

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[30] In addition to the cases cited by Senator Bayh, there were several employment cases decided under Section 504 prior to the 1978 Amendments. *See, Whitaker* v. *Board of Higher Education*, 461 F.Supp. 99, 106-109 (E.D. N.Y. 1978); *Davis* v. *Bucher*, 451 F.Supp. 791 (E.D. Pa 1978); *Duran* v. *City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977), 451 F.Supp. 954 (M.D. Fla. 1978); *Drennon* v. *Philadelphia General Hostpial*, 428 F.Supp. 809 (E.D. Pa. 1977).

As early as 1976 Congress was explicitly told of a number of other cases brought under Section 504. *See, Oversight Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same By Agencies Under the Rehabilitation Act of 1973, before the Senate Subcommittee on the Handicapped of the Committee on Labor and Public Welfare*, 94th Cong. 2d. Sess. (1976) at 490-495 (*1976 Senate Oversight Hearings*). Congress knew from other sources much earlier. 120 Cong. Rec. 15743-151744 (1974) (remarks of Rep. Biaggi).

At no time did any member of Congress express disapproval of such private suits.

262, 303. The head of HEW's Office of Civil Rights, which had jurisdiction over Section 504 complaints, stated:

> "I believe it is important that the private right of action for individuals be preserved. HEW is not in a position and does not have the resources to do the whole job. Therefore, it is important that handicapped individuals have available as many avenues of resource as possible. . . .
>
> Having been a civil rights lawyer, I can assure you one of the best ways to encourage litigation and make it possible for the indigent handicapped to seek redress in the courts, is to make provision for the award of attorneys' fees. . . .

Id. at 358 (Statement of David Tatel).[31]

Congress responded to this testimony by enhancing the remedies available to private parties and encouraging further federal private suits. *S.Rep.* No. 95-890, *supra*, at 18; *H. Rep. No. 95-1149, supra*, at 21.

Post 1978 Congressional statements likewise strongly support private enforcement rights:

> It is, and has always been the Committee's intent that *any handicapped individual* aggrieved by a violation of Title V [Section 504] *has the right under existing law to proceed privately in federal court to enforce the rights and remedies afforded under title V of the Rehabilitation Act of 1973*, as amended, and to receive back pay and attorneys' fees if successful.

S. Rep. No. 96-316, 96th Cong., 1st Sess. (1979) at 12-13. (Emphasis added).

There simply is no support in the history of Sections 504 and 505 for the proposition that Congress sought to limit the courts to which private parties enforcing Section 504 could go. When Congress wanted to limit the relief available under Sections 504 and 505, it knew how to do so and so stated. *See, e.g.*, 124

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[31] *See also, Whitaker* v. *Bd. of Higher Ed., supra*, 461 F.Supp. at 108-09, in which Michael Middleton, the Director of Policy and Procedure for HEW's Office of Civil Rights, filed a declaration to the same effect.

Cong. Rec. 30,576-30,579 (1978) [Amendments to Section 505(a)(1), 29 U.S.C. § 794a(a)(1)].

There is also no support for California's and the United States current implicit position (Pet. Br. at 27-28, Br. of U.S. at 16 n.11) that if a cause of action exists in federal court under Section 504, such an action exists only by virtue of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and must satisfy the "fiction" of *Ex parte Young*, 209 U.S. 123 (1908), before relief can be granted. During the *1977 Section 504 Implementation Hearings*, *supra*, at 262-265, Congress was explicitly told of the limitations of a Section 1983 cause of action, that it applied only to suits against public officials and that plaintiffs bringing suits directly under Section 504 could not recover attorney's fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 USC § 1988. Congress was also told that 70% of the administrative complaints filed with HEW alleged employment discrimination. *Id.* at 341. Moreover, Congress was well aware from as early as 1976 that numerous Section 504 suits were being brought directly against public entities and not just against individuals. *See*, *1976 Senate Oversight Hearings*, *supra*, at 494-495; also notes 20 and 30, *supra* and accompanying text. With this history, the 1978 Amendments can only be viewed as Congress' express approval of all federal private enforcement actions and as a desire on the part of Congress to remove all hurdles to effective enforcement of Section 504. Nothing in the legislative history of Sections 504 and 505 even remotely suggests that Congress intended to codify the *Ex parte Young* fiction within these sections as a predicate for successful federal court action.[32]

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[32] When Congress intended to codify existing practice into Section 504 it said so. S.Rep. No. 95-890, *supra*, at 19. If Congress was satisfied with enforcement of Section 504 under Section 1983 and if Congress wanted to preserve the *Ex parte Young* fiction within Section 504 proceedings, it did not need to add a separate attorney's fees provision to the Rehabilitation Act. The Civil Rights Attorney's Fee Act of 1976, 42 U.S.C. § 1988, already allowed for recovery of

C. Under Existing Case Law The Eleventh Amendment Does Not Bar This Suit.

1. Congress has abrogated California's Eleventh Amendment Immunity.

In enacting Sections 504 and 505 Congress has brought "the states to heel." *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 283 (1973). Unmistakeably, Section 504 deliberately imposes substantive requirements on the states. *See* Part 1A *supra*. Thus, Section 504 is markedly different from other acts that merely declare policy, *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 19 (1981), or are merely cooperative federal-state programs. *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Florida Dept. of Health* v. *Fla. Nursing Home Ass'n.*, 450 U.S. 147 (1981).

Moreover, the Congress utilized its enforcement powers under Section 5 of the Fourteenth Amendment both to create the requirements of Section 504 and to reinforce them through private action against a class of defendants that literally included the states. *See* Part 1B *supra; Fitzpatrick* v. *Bitzer*, *supra; Hutto* v. *Finney*, *supra*. Consequently, "the threshold fact of congressional authorization to sue a class of defendants which literally includes States," *Edelman* v. *Jordan*, *supra*,

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attorneys' fees in suits brought under Section 1983 against public officials.

Ironically, in *Brown* v. *Pitchess*, 13 Cal.3d 518, 119 Cal.Rptr. 204, 531 P.2d 772 (1975), the California Attorney General vigorously argued against concurrent state and federal court jurisdiction over federal civil rights claims on the ground, *inter alia*, that a finding of concurrent jurisdiction would loose a "Johnstown flood of litigation" which would "inundate the judicial system of this State." *Id.*, 13 Cal.3d at 522.

Furthermore, California's position appears to be internally inconsistent. If a state is deliberately included by Congress within a "class of defendants" against whom federal suit can be brought, *Edelman* v. *Jordan*, *supra*, 415 U.S. at 672, then Eleventh Amendment immunity has been abrogated. *Id. Ex parte Young* would not apply in such a situation.

415 U.S. at 672, is present in Section 504. *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 456, and *Hutto* v. *Finney*, *supra*, 437 U.S. at 693-698 & n.31, both recognize that where Congress acts pursuant to its powers under the Fourteenth Amendment, and deliberately includes the states within the class of defendants affected by private federal court suit under the statute, the Eleventh Amendment is not a bar to the action.

The Court should reject California's and United States' interpretation of *Edelman* v. *Jordan*, *supra*, and *Quern* v. *Jordan*, 440 U.S. 332 (1979), Pet. Br. at 30-51; Br. of U.S. at 13-17. This Court has never held that Fourteenth Amendment legislation needs to comply with rituals and needs to specify in so many words that the Eleventh Amendment was being abrogated. Not only is such a requirement a redundancy, *Ex parte Virginia*, *supra*, but a substantial curtailing of legislative authority.

Moreover, Section 504 was considered and enacted in 1972 and 1973 prior to *Edelman* and *Quern*. At that time this Court's decision in *Parden* v. *Terminal Railway of Alabama State Docks*, *supra*, was the standard by which Congress' intentions to subject the states to suit were tested—namely whether the class Congress subjected to suit under a federally created cause of action included states. *Id.*, 377 U.S. at 187-190.[33] Congress in enacting Section 504 used the term recipients which literally—and intentionally—included states. *See* Part 1A *supra*. Congress complied with *Parden* and that should be all that is required.

There are no countervailing considerations that militate against this conclusion. Unlike the Fair Labor Standards Act (FLSA), a non-Fourteenth Amendment act construed in *Employees* v. *Missouri Public Health Dept.*, *supra*, Section 504 does not envision enforcement to be exclusively or even primarily by the federal government. In fact, Congress took

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[33] *See also*, *Edelman* v. *Jordan*, *supra*, 415 U.S. at 670 n.13, cataloguing cases where this Court summarily affirmed federal court decisions ordering the payment of retroactive benefits.

steps to enhance private enforcement of Section 504 after being told by advocates and the administration alike that administrative enforcement was a dismal failure. *See 1977 Section 504 Oversight Hearings*, *supra*, at 215, 234, 245, 259, 260, 303, 341, 358. In addition, unlike under the FLSA, states are treated no differently than are other recipients under Section 504. *See S. Rep.* No. 96-316, *supra* at 12-13.

Contrary to the new position of the United States, the fact that damages have been prayed for does not change the result. The United States forgets that in enacting Section 504 Congress has provided for federal court suit and has limited states' rights. In so doing Congress specifically excluded no remedies. *Cf. Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). California cannot have an expectation of escaping financial liability when it engages in intentional discrimination in clear violation of Section 504. *Cf.*, *Guardian's Association*, *supra*, 103 S.Ct. at 3229-3230 (White, J.); *Darrone*, *supra*, 104 U.S. at 1252-1253, and nn.9-10. Such relief is crucial to deter future employment discrimination, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-423 (1975), which is one of the principal targets of Section 504. *Darrone*, *supra*, 104 S.Ct. at 1253-1254.[34] Furthermore, in the posture of this case, there is no proof that a retrospective damage award would be "enormous," *Quern* v. *Jordan*, 440 U.S. 332, 344 n.16 (1979),[35] or

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[34] HEW's regulations put California on notice long ago that it would have to take "remedial action" to correct acts of discrimination, 45 C.F.R. § 84.6 and App. A ¶ 9. These regulations also warned the states of the likelihood of private enforcement. 45 C.F.R. § 84, App. A ¶ 8, *See* S. Rep. 9-316, *supra*, at 12-13. When Congress was concerned about the costs imposed by Section 504 it so stated. *See*, *supra*, notes 20 and 31-32 and accompanying text.

[35] J.A. at 9, ¶ 8. It is not inconceivable that statutory attorney's fees in this and numerous other Section 504 damage actions could exceed the damage recovery. *Cf.*, *Coop* v. *South Bend*, 635 F.2d 652 (7th Cir. 1980); *Perez* v. *University of Puerto Rico*, 600 F.2d (1st Cir. 1979); *Burt* v. *Abel*, 585 F.2d 613 (4th Cir. 1978); *see also*, Larson, *Federal Court Awards of Attorney's Fees* (1981). Yet unmistakeably Congress has the power to impose such fees upon the States. *Hutto* v.

that it would necessarily come out of the state treasury. *Ford Motor Co.* v. *Dept. of Treasury*, 323 U.S. 459 (1945).[36]

The position newly advanced by the United States would gut the act. Congress passed Section 504 knowing that it would cost the states their own money to comply. Despite this the rule advanced by the United States would allow the states to escape federal court liability whenever the state had to expend money to remedy an act of discrimination. As the United States observed before this Court in only a slightly different context, *Univesity of Texas* v. *Camenisch*, 451 U.S. 390 (1981), Br. of United States as *amicus curiae* at 19:

> "If accepted, petitioners' contention . . . would signal the end of nearly all compulsory measures to aid the handicapped under Section 504. Recipients of federal funds would not have to build a single ramp to make . . . buildings accessible to handicapped persons. They would not be required to modify a single bathroom so that it could be used by handicapped persons. They would not be obligated to undertake any effort at all to enable qualified persons to participate in federally funded programs where that effort involved the slightest identifiable expense. This cannot be what Congress intended. . . . [The Court] should decline petitioners' invitation to construe the statute in such a way as to drain it of nearly all practical impact."

When states accept federal financial assistance, they agree to comply with the provisions of Section 504. If states nonetheless discriminate they should not be permitted to escape the logical federal court consequences of that discrimination. To hold otherwise would be to sanction the use of at least some federal monies in a discriminatory manner, precisely the result Congress sought to eliminate by enacting Section 504. Dam-

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Finney, *supra*. Moreover, in exchange for the billions of dollars in federal assistance received by California, *see* note 2, *supra*, it is not unrealistic to expect the state to pay retrospective relief when it intentionally violates Section 504. *Compare*, *Pennhurst I*, *supra*, 451 U.S. at 24.

[36] It could, for instance, come out of any unspent portion of federal financial assistance or some other non-state grant.

ages may be the only appropriate form of relief in an employment dispute such as this. *Cf. Davis* v. *Passman*, 442 U.S. 228, 245 (1979); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395 (1971). Since federal grants are of a limited duration, by the time judicial resolution occurs there may be no job or federally funded program in which to place a prevailing plaintiff. For a plaintiff such as Scanlon it may well be damages or nothing.

Moreover, the result urged by the United States would force Section 504 plaintiffs into state courts even though federal civil rights have long been vindicated in federal court. *Mitchum* v. *Foster, supra; Ex parte Virginia*, 100 U.S. 339, 346 (1880). Such a result could not have been expected by Congress. If handicapped persons nonetheless wish to pursue their federal court rights, they either will have to file two separate lawsuits or will have to rely on administrative enforcement by the federal government for retrospective relief—something which has yet to occur in this case, even though HEW found the State in violation of Section 504 over 6 1/2 years ago. J.A. at 13. Surely Congress enacted Section 504 and enhanced it with Section 505 to give federal plaintiffs viable remedies. *Dopico* v. *Goldschmidt*, 687 F.2d 644, 643 (2d Cir. 1982); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

Finally, California makes too much out of the provision for Title VII remedies in Section 505(a)(1), 29 U.S.C. § 794a(a)(1), in suits against the federal government. Section 505(a)(1) suits are exclusively employment related. *See* 29 U.S.C. § 791. Hence it is reasonable to apply Title VII's requirements to such actions. In contrast, Section 504 covers employment discrimination and much more. *Alexander* v. *Choate, supra*, 105 S.Ct. at 718-719. Title VII remedies would create an additional administrative delay to enforcing Section 504 rights. As the *1977 Section 504 Implementation Hearings, supra*, indicate, Congress enacted Section 505 to remove such delay. *See also*,

Lloyd v. *Regional Transportation Authority*, *supra*, 548 F.2d at 1284-1288.[37]

2. California has waived its Eleventh Amendment Immunity.

Article III, Section 5, of the California Constitution provides:

> Suits may be brought against the State in such manner and in such courts as shall be directed by law.

The California Supreme Court in *Muskopf* v. *Corning Hospital Dist.*, 55 Cal.2d 211, 217, 11 Cal.Rptr. 89, 359 P.2d 457 (1961), a case which swept away governmental immunity,[38] held Article III, Section 5, previously codified at Article XX, Section 6, constituted the state's consent to be sued. As a consequence, in California, unless immunity is affirmatively imposed by the legislature, no such immunity exists.[39]

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[37] Similarly, California's arguments under other statutes are misdirected. Pet. Br. at 58-62. The inquiry here is not whether Congress can abrogate states' Eleventh Amendment immunity in some other fashion but, rather, whether in the context of this statute Congress has abrogated any immunity of the state.

[38] The state Supreme Court in *Muskopf* v. *Corning Hospital Dist.*, 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961), "discarded as mistaken and unjust" "the rule of governmental immunity from tort liability." 55 Cal.2d at 213. In so doing, the court noted that the doctrine of governmental immunity was originally court made (55 Cal.2d at 218), and was now an anachronism without rational basis which had continued only by the force of inertia. 55 Cal.2d at 216. The Court noted that the maxim "the King can do no wrong" appeared to originally mean only that the King was not privileged to do wrong. 55 Cal.2d at 214 n.1. *See, generally*, Note, *Torts: Sovereign Immunity: Scope of Doctrine Severely Limited in California*" 49 Calif.L.Rev. 400 (1961).

[39] In response to *Muskopf*, the legislature enacted moratorium legislation (Chapter 1404, Statutes of 1961), pending enactment of a comprehensive legislative scheme by Chapter 1618, Statutes of 1963, California Gov't. Code §§ 800 *et seq.* The moratorium froze the *status*

No procedural barrier has been enacted by the state legislature to limit federal question suits against the state. In this respect California's laws differ substantially from the laws of other states.[40]

In *Florida Dept. of Health* v. *Florida Nursing Home Ass'n*, *supra*, there was no constitutional provision that made the department amenable to suit and the statute that was implicated only involved suit on contracts. In *Alabama* v. *Pugh*, 438 U.S. 781 (1978), the constitutional provision was the opposite of California's. It provided that "the State of Alabama shall never be made a defendant in any Court of law or equity." *Id.* at 782. In *Pennhurst State School Hosp.* v. *Halderman*, 104 S.Ct. 900, 909 n.12 (1984) *(Pennhurst II)*, this Court pointed to no Pennsylvania constitutional provision which constituted waiver of Eleventh Amendment immunity. Further, enactment of 42 Pa. Cons. Stat. § 8521(b) (1980), which expressly withheld waiver of Eleventh Amendment rights during the

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quo ante Muskopf during the drafting period. *See also, Harland* v. *State of California*, 99 Cal.App.3d 839, 845-846, 160 Cal.Rptr. 613 (1979)(held state subject to postjudgment interest like all other litigants where legislature had not expressly exempted state). *Accord, Green* v. *California*, 73 Cal. 29, 32-33 (1887)(once state consents to suit, subject to the same rules as ordinary litigants).

[40] That difference was recognized by this Court in *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 50-51 (1944), in its discussions of *Smith* v. *Reeves*, 178 U.S. 436 (1900), a case brought in federal court by railroad receivers against the California treasurer to recover previously paid state taxes. This court noted that California law, unlike the law of other states, permitted suits against governmental officials in their official capacity. *Great Northern Life Ins. Co.* v. *Read*, *supra*, 322 U.S. at 50-51. However, this Court found the Eleventh Amendment barred the state law claims because of the political nature of tax collection (*Id.* at 51), and because of the statutory conditions precedent to suit, in particular, the statutory right of removal to Sacramento County Superior Court. *Smith* v. *Reeves*, *supra*, 178 U.S. at 441. Here we are dealing with the vindication of federal civil rights, a matter not traditionally exclusively within the province of the states. *Cannon*, *supra*, 441 U.S. at 708-709.

course of the litigation, operated to cut-off any federal court actions which had not vested by a final judgment. *Beers* v. *Arkansas*, (20 How.) 527 (1858).

California's Fair Employment and Housing Act, California Government Code §§ 12900 *et seq.*, to which California has directed the Court's attention, Pet. Br. at p. 29, n.6, expressly acknowledges a federal court remedy for employment discrimination, including handicap discrimination. It merely limits the scope of the action permissible in state court when there is a federal action pending.[41]

In the circumstances of this case where a federal statute creates rights against California and the state has enacted no bar to federal suit, the state is amenable to suit in all forums.

3. California has consented to suit

As California admits, Pet. Br. at 27-28, Section 504 creates a privately enforceable federal cause of action against it. In this situation, by voluntarily participating in a host of federal assistance programs, California has consented to suit. *Parden* v. *Terminal Ry. of Alabama State Docks*, 377 U.S. 184 (1964); *Petty* v. *Tennessee-Missouri Comm'n.*, 359 U.S. 275 (1959).[42]

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[41] Calif. Gov't. Code § 12965(b) provides in pertinent part:

> ". . . Such actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where such persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants . . ." Calif. Gov't. Code § 12965(b).

This is state legislation which by its "express language" or "overwhelming implications" acknowledges that California is amenable to suit in federal court. *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

[42] Neither California nor the United States contests that Section 504 is validly enacted pursuant to Article I, Section 8. There can be little doubt of the ability of Congress to set conditions on the grant of federal money. *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *Oklahoma*

Moreover, under federal and California law, the State by participating in a federally regulated activity "must be held to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent." *Maurice* v. *State of California*, 43 Cal.App.2d 270, 277 (1941).[43] The California Supreme Court in *Hall* v. *University of Nevada*, 8 Cal.3d 522, 524, 105 Cal.Rptr. 355, 503 P.2d 1363 (1972), *cert. denied*, 414 U.S. 820 (1973), endorsed the principles articulated in *Parden* and *Maurice*, namely that "the state by engagning in . . . [federally regulated conduct] and thereby subjecting itself to the federal legislation must be deemed to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent." *Id.* at 524.[44]

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v. *Civil Service Commission*, 330 U.S. 127, 142-143 (1947); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 474-475.

[43] The reasoning of *Maurice* v. *California*, 43 Cal.App.2d 270 (1941), was considered persuasive in *Parden* v. *Terminal Ry. of Alabama State Docks*, *supra*, 377 U.S. at 193.

[44] Differences among the states' laws result in differences in the application of the Eleventh Amendment. This Court in *Sosna* v. *Iowa*, 419 U.S. 393, 396 n.2 (1975), noted the differences between Iowa and Indiana law. Under Indiana law, appearance and failure to raise sovereign immunity in the district court would not bar raising the defense later—even in the Supreme Court. *Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974); *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459, 466-467 (1945). Under Iowa law, however, "the State consents to suit and waives any defense of sovereign immunity by entering a voluntary appearance and defending a suit on the merits." *Sosna* v. *Iowa*, *supra*, 419 U.S. at 396 n.2. Thus while under the law of other states no sovereign immunity consequences are triggered by participating in a federally regulated activity, such is not the case under California law.

II. *HANS* V. *LOUISIANA* SHOULD BE OVERRULED. ITS EXTENSION OF THE ELEVENTH AMENDMENT TO BAR FEDERAL COURT JURISDICTION OVER FEDERAL QUESTION CASES IS CONTRARY TO THE ELEVENTH AMENDMENT'S ORIGINAL MEANING.

Respondent believes that Congress in enacting Section 504 abrogated any Eleventh Amendment immunity California may possess and that California has waived its Eleventh Amendment immunity and has consented to suit. If, however, this Court finds no abrogation, waiver or consent, then respondent urges this Court to reconsider and to overrule *Hans* v. *Louisiana* insofar as *Hans* limits federal court jurisdiction over federal question cases.

In recent years constitutional historians have been in virtually unanimous agreement that the historical analysis on which *Hans* was based was faulty.[45] *Hans* and its progeny have in recent years spawned a confusing and unpredictable series of opinions. Despite the decision in *Hans*, over the eleven years since *Edelman* v. *Jordan*, *supra*, this Court has decided numerous cases[46] brought against state agencies, whose very title announced the presence of a jurisdictional problem. *Compare Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 663 n.5 (1978). *Hans* and its progeny are unsound

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[45] See Appendix B listing. Counsel for *Hans* did not question the historical analysis advanced by the State of Louisiana and accepted by the Court.

[46] *See, e.g., Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982); *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457 (1982); *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981); *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979); *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Ohio Bureau of Employment Serv.* v. *Hodony*, 431 U.S. 471 (1977); *Scott* v. *Kentucky Parole Board*, 429 U.S. 60 (1976); *Virginia State Board of Pharmacy* v. *Virginia Citizens*, 425 U.S. 798 (1976); *Hawaii Housing Authority* v. *Midkiff*, 81 L.Ed.2d 186 (1984); *NCAA* v. *Board of Regents of University of Oklahoma*, 82 L.Ed.2d 70 (1984); *Minnesota State Board for Community Colleges* v. *Knight*, 79

in principle and unworkable in practice. *Cf. Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (February 19, 1985). The time has come to reconsider whether *Hans* was properly decided. "The political process [and not the Court] insures that laws that unduly burden the States will not be promulgated." *Id.*, Slip Op. at 27.

A. The Adoption Of Article III.

By the end of the eighteenth century the common law doctrine of sovereign immunity had been so circumscribed that it no longer could be utilized to deny a subject otherwise appropriate relief.[47] Blackstone devoted several sections of his *Commentaries* to the judicial remedies available to subjects "in case the crown should invade their rights."[48] Most of the colonial governments had themselves been subject to suit in American courts. Six colonies had charters expressly authorizing such suits,[49] and the grantees of the three proprietary colonies,[50] being natural persons, were also subject to suit. Several of the states adopted as part of their constitutions the old colonial

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L.Ed.2d 299 (1984); *Public Service Commission* v. *Mid-Louisiana Gas Co.*, 77 L.Ed.2d 668 (1983); *New Mexico* v. *Mescalero Apache Tribe*, 76 L.Ed.2d 611 (1983); *Pacific Gas & Electric* v. *State Energy Resources Conservation & Development Commission*, 75 L.Ed.2d 752 (1983).

[47] Jaffee, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 1819 (1963). Jacobs cites several examples of actions for property or funds successfully maintained against the government. C. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 5-6, 20, 165-66 nn.6, 7 (1972) *See also* Borchard, *Government Liability in Tort*, 34 Yale L.J. 1 (1924).

[48] W. Blackstone, *Commentaries on the Laws of England*, I, 241-44; III, pp. 47-48.

[49] Massachusetts, Connecticut, Rhode Island, New Hampshire, Georgia and Virginia (1609 Charter). Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Col. L. Rev. 1890, 1896-97 nn.29-34 (1983) (Gibbons).

[50] New York, Maryland and Pennsylvania.

charters subjecting the government to suit,[51] and Pennsylvania and Virginia[52] wrote into their laws an express disavowal of any immunity.[53]

The proceedings of the Convention which approved Article III contain no evidence suggesting that the delegates read Article III to contain any unspoken exceptions to its literal language. The Committee of Detail which drafted Article III left no records explaining its interpretation of that provision, although it appears that it was James Wilson of Pennsylvania who suggested including jurisdiction over litigation between a state and a citizen of another state.[54] However, there are records from the ratification debate. These records plus the chronology of that debate are of critical importance to an understanding of the Eleventh Amendment.

The first commentary on the citizen-state diversity clause came in one of a series of letters by Tench Coxe, written under the pseudonym "American Citizen," which was widely reprinted in American newspapers in the fall of 1787 and subsequently circulated as a pamphlet.[55] Coxe urged:

> [W]hen a trial is to be had between the citizens of any state and . . . the government of another, the private citizen will not be obliged to go into a court constituted by the state, which . . . his dispute is. He can appeal to a dis-

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[51] Connecticut and Rhode Island. *See* Gibbons, *supra* note 49, at 1898, n.42.

[52] Laws of Virginia, 1794, c.85.

[53] Even if state had enjoyed immunity from suit in its own courts, under prevailing legal principles that immunity would not have extended to suit in the court of another sovereign, be it the court of a fellow state or the newly formed federal government. *Nevada* v. *Hall*, 440 U.S. 410, 414 (1979).

[54] Mathis, *The Eleventh Amendment: Adoption and Interpretation* 2 Ga. L.Rev. 207, 211 n.16 (1968).

[55] P. Ford, *Pamphlets on the Constitution of the United States*, 133 (1888).

> interested federal court. This is surely a great advantage, and promises a fair trial, and an impartial judgment."[56]

Coxe's interpretation of Article III, was shared by Richard Henry Lee, a leading opponent of ratification. Lee's views first appeared in a series of letters to a New York newspaper from "The Federal Farmer."[57] Lee's letter of October 10, 1787, sharply questioned the propriety of authorizing suits against states by citizens of other states or of foreign countries.[58] That was the state of the public debate in early December of 1787 when Delaware became the first state to ratify the Constitution. Any member of that convention familiar with the pamphleteering of the day could only have concluded that Article III was to be read literally.

The initial agreement as to the meaning of Article III was to continue unquestioned for almost seven months. On December 4, 1787, James Wilson, a member of the committee which had drafted Article III, argued at the Pennsylvania convention that permitting citizens of one state to sue another state in federal court was necessary both to assure fairness and to encourage commerce:

> Impartiality is the leading feature in this Constitution; it prevades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing. . . .[59]

Wilson also defended the exercise of federal jurisdiction over suits against a state brought by foreign nationals.[60] Wilson insisted that federal jurisdiction was proper over suits brought by the United States against a state.[61] A week later, a letter to

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[56] *Id.* at 149.

[57] *Id.* at 277.

[58] *Id.* at 309.

[59] 2 *The Debates in The Several State Conventions of the Adoption of the Federal Constitution* 491 (J. Elliot, Ed. 1866).

[60] *Id.* at 491-492.

[61] *Id.* at 490. Wilson had earlier attacked suggestions that the states should be treated as sovereigns. *Id.* at 457.

the Massachusetts Gazette from Agrippa objected to the fact that the proposed constitution subjected a state to suit in federal court by its own citizens.[62] In the face of these consistent interpretations of Article III both Pennsylvania and Massachusetts ratified the Constitution.

An essay by "Brutus" appeared in the February 21, 1788, New York Journal, attacking the creation of federal jurisdiction over suits against a state by citizens of another state:

> I conceive the clause which extends the power of the judicial to controversies arising between a state and citizens of another state, improper in itself, and will, in exercise, prove most pernicious and destructive.[63]

Despite the fact that Brutus had accurately foreseen the problem which would later come to a head in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), his argument prompted no immediate response. The constitution was subsequently ratified by New Jersey, Georgia, Connecticut, Maryland, South Carolina and New Hampshire.[64] Since New Hampshire was the ninth state to rafity, its action was sufficient under Article VII to put the new Constitution into effect.

The other two states to ratify the Constitution[65] were Virginia and New York. Virginia is the only state of the thirteen which considered the Constitution in which any member of the ratifying convention suggested that states might not be subject to suit under Article III. George Mason, who opposed virtually all of the grants of jurisdiction in Article III, objected

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[62] 4 *The Complete Anti-Federalist* 78 (H. Storing, Ed. 1981).

[63] 2 *The Complete Anti-Federalist* 429 (H. Storing, Ed. 1981).

[64] North Carolina and Rhode Island initially refused to ratify the Constitution, agreeing to do so in 1789 and 1790, respectively, only after the Constitution had gone into effect.

[65] New Hampshire ratified the Constitution on June 21, 1788. Although a new interpretation of Article III had been offered the day before in Virginia, it was of course impossible for anyone in New Hampshire to have known that that had occurred.

to the citizen-state diversity clause insofar as it authorized a private individual to sue a state of which he was not a citizen.[66] Two days later, on June 20, Madison and Marshall both advised the convention that the clause at issue only authorized suits in which a state was a plaintiff.[67] But those who opposed subjecting the states to suit under that clause simply did not accept that unlikely explanation of its meaning. Patrick Henry responded to Madison:

> As to controversies between a state and the citizens of another state, his construction of it is to me perfectly incomprehensible. . . .[68]

Equally significant, other proponents of Article III rejected the Marshall-Madison reading, and defended subjecting states to suit in federal court. Governor Randolph expressly disavowed that strained reading.[69]

Edmund Pendleton, the president of the Virginia convention, similarly defended "the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party."[70] In light of the consistent interpretation of Article III over the first eight months of the ratification process, which interpretation was openly supported by Randolph

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[66] 3 *The Debates in The Several State Conventions of the Adoption of the Federal Constitution* 526-27 (J. Elliot, Ed. 1866) ("claims respecting . . . lands, every liquidated account, or other claim against this state, will be tried before the federal court. is not this disgraceful? Is this state to be brought to the bar of justice like a deliquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender?")

[67] *Id.* pp. 533 (Madison), 555-6 (Marshall). The sincerity of these representations has been questioned. *See* Gibbons, *supra*, 83 *Col L.Rev.* at 1907 (1893).

[68] Elliot, *supra*, v. 3, p. 543. Similarly, Madison's suggestion that a state could not be sued by a foreign nation in federal court unless the state first consented, (*id.* at 533) was rejected by Grayson, *Id.* at 567.

[69] *Id.* at 573.

[70] *Id.* at 549.

and Pendleton, it is difficult to believe that any delegate to the Virginia convention who opposed the prospect of a state being sued in federal court could have been persuaded by the statements of Madison and Marshall that the Constitution meant no such thing. The convention's conclusion regarding this controversy was clearly indicated by its decision to propose to the other states a constitutional amendment to repeal in its entirety the citizen-state diversity clause.[71]

The New York convention would be of little significance to the construction of Article III but for the dates on which it occurred. No member of that convention spoke in favor of or in opposition to lawsuits against the states in federal court. While the New York convention occurred after the publication of The Federalist No. 81, which was heavily relied on in *Hans*. 134 U.S. at 12-13, there is no direct evidence that No. 81, published on July 4 and 8, 1788, or the issues it raised influenced, or were of concern to, the New York convention. At the New York convention no delegate, not even Hamilton who had written No. 81, relied during the debates on the ideas No. 81 contained regarding Article III.[72]

Any delegate to the New York convention who did read the Federalist might well have understood its interpretation of Article III quite differently from that suggested by *Hans*. The general analysis of federal jurisdiction is contained in No. 80 of The Federalist, not No. 81. No. 80 defends the citizen-state diversity clause:

> The power of determining causes . . . between one State and the citizens of another . . . is . . . essential to the peace of the Union.
>
> . . . [T]he national judiciary ought to preside in *all* cases in which one State or its citizens are opposed to another States or its citizens. . . .[73]

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[71] *Id.* at 660-661.

[72] *The Federalist Papers*, xi (Mentor Ed., 1961) (introduction by Clinton Rossiter).

[73] *Id.* at 477-78 (emphasis added)

The passage relied on by *Hans* is contained in a "digression" in a part of No. 81 otherwise unrelated to the scope of federal jurisdiction. That digression is not, however, a general analysis of Article III or the citizen-state diversity clause, but is limited to the narrow issue of whether state bonds could be enforced in federal court by assigning them to a citizen of another state. Hamilton insisted as a matter of substantive law that public securities could not be enforced in that manner.[74]

North Carolina and Rhode Island, both acting after the publication of No. 81, initially refused to ratify the Constitution. In North Carolina William Davie, a former delegate to the constitutional convention, defended Article III:

> [T]he federal courts should have cognizance of controversies between two or more states, [and] between a state and the citizens of another state. . . . Its jurisdiction in these cases is necessary to secure impartiality in decisions, and preserve tranquility among the states. It is impossible that there should be impartiality when a party affected is to be judge.[75]

A majority of the convention clearly disagreed with Davie's argument, though it evidently concurred in his interpretation of Article III. Sitting as a committee of the whole it adopted a resolution calling for the amendment of Article III to eliminate citizen-state diversity jurisdiction.[76] The convention then

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[74] *Id.* at 487-88: It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. (emphasis in original.)

[75] Elliot, *supra*, note 59, v.4 p. 159.

[76] *Id.* at 246.

voted down a proposal to ratify the constitution as written.[77] In 1790, after the constitution had gone into effect, Rhode Island too finally gave its approval, but simultaneously proposed a constitutional amendment that would have barred federal jurisdiction over any suit commenced against a State.[78]

B. The Adoption Of The Eleventh Amendment.

The adoption of the Eleventh Amendment was precipitated by this Court's decision in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), holding that a state was subject to suit for the payment of an ordinary debt. The view that *Chisholm* was inconsistent with a pre-existing national understanding as to the meaning of Article III is difficult to reconcile with the composition of the majority in that decision. Justice Wilson had been a delegate to the constitutional convention, a member of the committee which drafted Article III, and a delegate to the Pennsylvania ratifying convention. Justice Blair not only served at the constitutional convention, but participated in the Virginia convention, the only state convention at which the *Hans* interpretation of Article III had been aired. Chief Justice Jay served at the New York convention, and as a co-author of The Federalist was certainly familiar with the content and intended meaning of Nos. 80 and 81. Justice Cushing had been a member of both the national and the Massachusetts convention.[79] Attorney General Randolph, who served at both the national and Virginia conventions, undertook to represent the plaintiffs in *Chisholm* and a companion case.

Public reactions to *Chisholm* v. *Georgia* was far from unanimous. A committee of the Delaware Senate commended the decision, asserting that states should be "as compellable to pay

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[77] *Id.* at 250-51.

[78] U.S. Department of State, *Documentary History of the Constitution*, v.ii, p. 317 (1894).

[79] 1 *The Justices of the United States Supreme Court 1789-1969*, pp. 9 (Jay), 60, 63 (Cushing), 87, 90 (Wilson), 110-111 (Blair) (L. Freidman & F. Israel, Eds. 1969).

their debts as individuals are."[80] Federalist generally applauded the opinion in *Chisholm*.[81] One Federalists paper, the Connecticut Courrant, observed:

> The decision . . . fixes a most material and rational feature in the judiciary of the United States. That every individual of any state has the natural privilege of suing . . . any state whatever in the Union, for redress in all cases where he can prove a just claim, a loss, or any injury having been sustained.[82]

While the Democratic-Republicans were critical of *Chisholm*, they did not necessarily advocate absolute state immunity from all suits. The Independent Chronicle, for example, objected that *Chisholm* might lead to a flood of ordinary damage actions, particularly by Tories whose property had been seized during the Revolution, but acknowledged that suits against a state might be proper if the state had violated the federal constitution.[83]

The distinction between the moderate position of the Independent Chronicle, and the more extreme view that states should never be subject to suit in federal court, appear throughout the period immediately preceding the framing of the Eleventh Amendment. The Virginia and North Carolina conventions took the more moderate approach, urging repeal of the citizen-state diversity clause. The Rhode Island convention, on the other hand, called for a constitutional amendment to declare that "the judicial power of the United States, in cases in which a state may be a party, does not . . . authorize

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[80] Journal of the Senate of the State of Delaware (January 1794) p. 9.

[81] Nowak, *The Scope of congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Co. L.Rev. 1413, 1434-6 (1975).

[82] February 25, 1793, p. 3 col. 2.

[83] July 23, 1793, p. 2, cols. 1-2.

any suit by any person against a State. . . .[84] When the First Congress convened in 1789, Representative Tucker of South Carolina proposed an amendment of the narrower variety, "to strike from Article III, Section 2, the words 'between a State and citizens of another State'. . . .[85]

Legislative responses to *Chisholm* were similarly divided. In February 1793, on the day after the decision, an amendment similar to that proposed by the Rhode Island convention was introduced in the House of Representatives:

> [N]o state shall be liable to be made a party defendant in any of the judicial courts, established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens or a forgeigner or foreigners, of any body politic or corporate, whether within or without the United States.[86]

The next day a second and far narrowed amendment was introduced in the House:

> The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.[87]

Congress adjourned without taking action on either of these proposals. While Congress was in recess during most of 1793 several state legislatures adopted resolutions urging the adoption of a constitutional amendment to overrule *Chisholm*, and recommending that that amendment, like the first House pro-

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[84] U.S. Department of State, *Documentary History of the Constitution*, v. ii., p. 317 (1894).

[85] Annals of congress, 1st Cong. 1st Sess., v. ii, 762-63 The House refused to act on this proposal. *Id.* at 792.

[86] 1 C. Warren, *The Supreme Court in United States History*, 101 (1922).

[87] Annals of Cong.1, 2d Cong., 1st Sess. v. iii, 651-52.

posed, expressly declare the states immune from suit by individuals under any circumstances.[88]

When Congress reconvened in January, 1794, the dominant Federalists, who had initially supported *Chisholm*, had reversed their position. That shift was apparently rooted not in any new view of the importance of state sovereignty, but in a number of related foreign policy developments.[89] But having resolved to overrule *Chisholm*, Congress had to choose between the two very different approaches which had been proposed in its previous session.

The difference between the two proposed amendments was as clear as the difference in the scope of the opinions of Justice Blair, on the one hand, and Justices Cushing, Wilson and the Chief Justice on the other. One proposal was narrowly framed so as to overturn only the majority's construction of the citizen-state diversity clause. The second proposal was intended to overrule the majority's view that the states as such enjoyed no immunity from suit in federal court, at least where enforcement of the Constitution or laws of the United States was sought. It would not have been surprising if Congress had decided to adopt the second proposal, since that version was clearly preferred by several states. But Congress chose otherwise, voting instead to propose to the states for ratification as the Eleventh Amendment a slightly modified version of the narrower proposal.[90] Viewed from the perspective of these

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[88] The Massachusetts and Virginia resolutions are reproduced in Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 Ga. L. Rev. 207, 224-26 (1968). The New Hampshire resolution is set forth in C. Jacobs, *The Eleventh Amendment and Sovereign Immunities*, 179-80 (1972).

[89] *See* Gibbons, *supra*, 83 Col. L. Rev. at 1926-41; Nowak, *The Scope of Congressinal Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Col. L. Rev. 1413, 1439-40 (1975).

[90] The history of these alterations is described in C. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 66-67 (1972).

developments, *Hans* and its progeny represent an attempt to read into the Eleventh Amendment the substance of the very proposal which the Third Congress quite deliberately rejected.

C. Early Interpretation Of The Eleventh Amendment.

In construing the Eleventh Amendment, substantial if not conclusive weight must be given to the interpretation placed on that provision by the Marshall Court. Two members of that Court had served in the state legislatures to which the Amendment had been referred for ratification,[91] and all were active in public life during that era.[92]

The Marshall Court consistently construed the Eleventh Amendment to be no more than a limitation on the citizen-state diversity jurisdiction clause of Article III. In *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.) 739 (1824), the court concluded that "the amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a state, by citizens of another state, or by aliens." 22 U.S. at 857-58. In *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 265 (1821), Chief Justice Marshall explained that the purpose of the Amendment was only to protect the states from actions under the citizen-state diversity clause to collect state debts. 19 U.S. at 406-07. In *United States* v. *Bright*, 24 Fed. Cas. 1232 (Cir. Ct. 1809), Justice Washington insisted that the scope of the Eleventh Amendment should be limited to its literal language, even if doing so might in some circumstances allow "the mischief meant to be remedied." 24 Fed. Cas. at

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[91] *The Justices of the United States Supreme Court 1789-1969*, v.1 286 (Marshall, Virginia), 409 (Todd, Kentucky) (L. Friedman & F. Israel, Eds. 1969).

[92] Justice Duvall was elected to Congress only a few months after it had approved the amendment (*id* at 422), Justices Livingston and Thompson had served in the New York Legislature shortly after it ratified the amendment (*id.* at 399-40), and Justice Washington, who had been a delegate to the Virginia ratification convention in 1788, remained politically active thereafter. *Id.* at 247.

1236. "[T]he soundest and safest rule by which to arrive at the meaning and intention of [the amendment] is to abide by the words which the lawmaker used." 24 Fed. Cas. at 1235.

This literal method of construction espoused by the Marshall Court led it to interpret the Amendment in a manner directly contrary to that of *Hans* and its progeny. *Cohens* held that the state enjoyed no immunity from an action which otherwise fell within the federal question jurisdiction of the federal courts. 19 U.S. at 382-83. The Court reasoned that in ratifying the constitution the states had surrendered their sovereignty with regard to any conduct that might be prohibited by the constitution or laws of the United States. *Id.* at 380-83.[93] In 1883, relying on *Cohens*, this Court held that the federal question jurisdiction conferred upon the lower courts by the Judiciary Act of 1875 included jurisdiction over such actions even if brought against a state. *Ames* v. *Kansas*, 111 U.S. 449, 470-72 (1884).

The Eleventh Amendment was also initially construed to leave unaffected the other grants of jurisdiction in Article III.[93] Following the adoption of that Amendment, The Supreme court dismissed all cases pending before it against states by private citizens, but declined to dismiss a case brought against South Carolina on behalf of the Prince of Luxembourg.[94]

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[93] The *Madrazo* cases are consistent with Chief Justice Marshall's reasoning in *Cohen*. *See* Gibbons, *supra*, 83 Col. L.Rev. at 1961-1968. In *Madrazo I*, *Governor of Georgia* v. *Madrazo*, 26 U.S. (1 Pet.) 110 (1828), the Marshall Court avoided a disposition on Eleventh Amendment grounds. *Madrazo II*, *Ex parte Madrazo*, 32 U.S. (7 Pet.) 627 (1833), was the only pre-Civil War Supreme Court suit disposed of on Eleventh Amendment grounds. The Court found there was no admiralty jurisdiction and then dismissed because the case then fell squarely within the literal terms of the Eleventh Amendment in that the only remaining basis for jurisdiction was Juan Madrazo's status as an alien and the defendant's status as a state.

[94] *See* Orth, *The Intrepretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, U. Ill. L.F. 423, 428 n.42 (1983).

Cohens interpreted the Amendment to have no application to actions against a state commenced by a foreign nation, 19 U.S. (6 Wheat.) at 406, and the Court interpreted that grant of jurisdiction in *Cherokee Nation* v. *The State of Georgia*, 30 U.S. (5 Pet.) 1, 15-16 (1831). Similarly, Justice Washington, sitting as a circuit justice, held that, despite the Eleventh Amendment, states were subject to suit in an admiralty proceeding, since the Eleventh Amendment was limited on its face to actions in law and equity. *United States* v. *Bright*, 24 Fed. Cas. 1232 (Cir. Ct. 1809). *Osborn* v. *Bank of the United States* 22 U.S. (9 Wheat.) 739, 751-59 (1824), sustained a circuit court order directing the auditor of Ohio to pay the plaintiff more than $100,000; although the funds were to come from the state treasury, and the state was thus the real party in interest. In *Davis* v. *Gray*, 83 U.S. (16 Wall.) 203, 221 (1873), the Court held that a state which had permitted itself to be sued in its own courts thereby waived an Eleventh Amendment immunity.

Hans and its progeny overtly disdain precisely the literal reading of the Amendment espoused in *Cohens* and *Bright*. *Hans* itself, in holding that the states enjoy immunity from the exercise of federal question jurisdiction, expressly departed from the contrary conclusion in *Cohens*. The holding in *Edelman* v. *Jordan* is precisely the opposite of the rule established by *Osborn*. Federal jurisdiction over suits against a state by a foreign nation, recognized in both *Cohens* and *Cherokee Nation*, was held to be precluded by the Eleventh Amendment in *Monaco* v. *Mississippi*, 292 U.S. 313 (1934). Federal admiralty jurisdiction over the states, expressly sustained in *Bright*, was rejected in *Ex parte New York*, 256 U.S. 490 (1921). The rule of *Davis* v. *Gray*, that a waiver of sovereign immunity in state courts works a waiver of Eleventh Amendment immunity, was limited in *Smith* v. *Reeves*, 178 U.S. 436 (1900).

Hans and its progeny have created a bewildering set of rules. Nowhere is the unpredictability of these rules better illustrated than in this case. Over a decade after section 504 was enacted, California had challenged the section based on

Eleventh Amendment cases decided post enactment. California's challenge occurs even though scores of federal court section 504 decisions have been rendered involving the states.[95] In the name of *Hans* the United States would have Congress consider the applicability to the states of each federal court remedy before the remedy could be available to rectify even the most clear cut act of discrimination. *Hans* and its progeny are unsound in principle and execution. This Court should reconsider *Hans* and overrule it. *Cf. Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (February 19, 1985).

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[95] *See, e.g., Southeastern Community College* v. *Davis, supra; University of Texas* v. *Camenisch, supra; Pushkin* v. *Regents of the University of Colorado, supra; Strathie* v. *Pennsylvania Dept. of Transportation*, 716 F.2d 227 (3rd Cir. 1983); *New Mexico Ass'n for Retarded Citizens* v. *New Mexico*, 678 F.2d 847 (10th Cir. 1982); *Sherry* v. *New York State Educational Dept.*, 479 F.Supp. 1328 (W.D.N.Y. 1979); *Brookhart* v. *Illinois State Board of Education*, 697 F.2d 179 (7th Cir. 1983); *Morlock* v. *Ohio*, 563 F.Supp. 15 (D.Ohio 1982); *Rhode Island Handicapped Action Committee* v. *Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983); *Ferris* v. *University of Texas*, 558 F.Supp. 536 (W.D.Tex. 1983); *Georgia NAACP* v. *Georgia*, 570 F.Supp. 314 (S.D.Ga. 1983).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

February, 1985

Respectfully submitted,

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APPENDIX

APPENDIX A

ADDITIONAL CONSTITUTIONAL PROVISIONS

1. The Spending Clause—Article I, Section 8, Clause 1, of the United States Constitution:

> Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

2. Article III, Section 2, Clauses 1 and 2, of the United States Constitution:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
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> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

3. The Supremacy Clause—Article VI, Clause 2, of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
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> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX B

Recent Scholarship Regarding State Immunity under Article III and The Eleventh Amendment

C. Jacobs, The Eleventh Amendment and Sovereign Immunity, 5-65 (1972).

Cullison, Interpretation of the Eleventh Amendment, 5 Houston L. Rev. 1 (1967) (no immunity where state violates federally created rights).

Field, The Eleventh Amendment And Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515 (1977) (Hans incorrectly decided).

Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than A Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983) (Eleventh Amendment has no effect on federal question jurisdiction).

Gibbons, The Eleventh Amendment and Sovereign Immunity: A Reinterpretation, 83 Col L. Rev. 1890 (1983) (Eleventh Amendment has no effect on federal question jurisdiction).

LeClerq, State Immunity and Federal Power—Retreat from National Supremacy, 27 U. Fla. L. Rev. 361 (1975) (Hans incorrectly decided).

Liberman, State Sovereign Immunity In Suits To Enforce Federal Rights, 1977 Wash. U.L.Q. 195 (Hans interpretation of Eleventh Amendment incorrect).

Mathis, The Eleventh Amendment: Adoption and Interpretation, 2 Ga. L. Rev. 207 (1968) (history of adoption of Article III and the Eleventh Amendment).

McCormack, Inter-governmental Immunity and the Eleventh Amendment 51 N.C.L. Rev. 485 (1973) (no state immunity in federal question cases).

Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the

Eleventh and Fourteenth Amendments, 75 Col. L. Rev. 1413 (1975) (history of adoption of Article III and the Eleventh Amendment).

Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv. L. Rev. 61 (1984) (Hans incorrectly decided.)

Thornton, The Eleventh Amendment: An Endangered Species, 55 Ind. L. J. 293 (1980) (Hans incorrectly decided).

Note, State Monetary Accountability for Civil Rights Violations: Reconciling the Eleventh and Fourteenth Amendments, 43 Albany L. Rev. 708 (1979) (Hans incorrectly decided).